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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,
v.
FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves this Court for leave to file the accompanying Brief *Amicus Curiae* in which we urge the Court to review the decision below.

At issue in this request for review is the proper construction of the statute of limitations provision of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), an issue over which three separate approaches exist as a result of conflicting rulings in the District of Columbia and Third Circuits, the Seventh Circuit, and now the Ninth Circuit. As a misreading of the

6-year limitations period can substantially curtail the ability of multiemployer plans to collect withdrawal liability, the Ninth Circuit's ruling, which takes the most restrictive approach and is therefore least favorable to plans, raises an issue of great national importance affecting the multiemployer plan community, generally, the participants and beneficiaries of multiemployer pension plans, employers who continue to select multiemployer pension plans as the vehicle for providing pension benefits, and the public at large which may be presumed to have a significant interest in workers' receiving their anticipated benefits upon retirement. As will be discussed further below, the NCCMP is well equipped to advise the Court on the issues raised by the Ninth Circuit's ruling and therefore files this Motion, as Petitioner has consented to the filing of an *amicus* Brief, but Respondent has not. The letters granting and refusing the NCCMP's request for consent have been filed with the Clerk of the Court.

INTEREST OF THE NCCMP

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These affiliated plans not only represent a majority of participants in multiemployer plans throughout the nation, but are also representative of the multiemployer plan community generally.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. For this reason, the NCCMP frequently participates as an *amicus curiae* before the Supreme Court of the United States as well as before the various courts of appeals. With regard to withdrawal liability assessments under MPPAA,[1] the NCCMP has represented the interests of multiemployer plans in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly v. PBGC*, 475 U.S. 211 (1986); and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The NCCMP also filed an *amicus* brief in *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994), which addressed the precise issue at bar. In addition, the NCCMP has been recognized as having had a "significant impact" on MPPAA by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980), and S10100 (daily ed. July 29, 1980).

In the present case, the NCCMP respectfully requests this Court to clarify the operation of the 6-year statute of limitations applicable to actions to collect withdrawal liability under MPPAA.

Congress chose not to include a statute of limitations provision applicable to actions to collect delinquent contributions under Title I of ERISA. However, Congress clearly intended that actions to collect withdrawal liability under Title IV of the statute should be subject to a uniform limitations period. However, in spite of the text of the statute, this has not occurred, and the decision below heightens the division of opinion which now exists among the courts of appeals which have issued rulings construing MPPAA's statute of limitations provision; *e.g.*, the Court of Appeals for the District of Columbia Circuit,[2] the Third

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[1] ERISA was amended in 1980 by MPPAA, Pub. L. 96-364, 94 Stat. 1208 (1980).

[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989).

Circuit,[3] the Seventh Circuit[4] and the Ninth Circuit. As a result of the conflict, three separate and distinct approaches now exist, two of which (those of the Ninth and Seventh Circuits) substantially curtail the trustees' enforcement rights and limit their discretion to act in the best interests of a plan and its participants and beneficiaries.[5]

The NCCMP is concerned that without this Court's review of the Ninth Circuit's opinion, further misreadings of the statute will occur, and hence further divisions of opinion. More specifically, the NCCMP is concerned that if either the Ninth or the Seventh Circuit's approach is adopted by those courts of appeals which have not yet addressed the statute of limitations issue, or by district courts in the absence of binding appellate precedent, the statutory scheme for collecting withdrawal liability will be substantially undermined, and the effectiveness of MPPAA reduced. In addition, the trustees' ability to encourage withdrawn employers to re-enter the plan under the statute's abatement rules will be substantially impeded unless they retain the statutory discretion *not* to declare a default and accelerate the debt.

Since the above results are inimical to the financial health of multiemployer pension plans, the NCCMP, on behalf of all of their affiliated pension plans, requests leave to file an *amicus* brief in support of the Petition for *Certiorari*. In analyzing the conflicting circuit court opinions, the NCCMP will focus its discussion upon the practical consequences which a misreading of MPPAA's statute of limitations will have on multiemployer plans, a topic on which the NCCMP is uniquely able to provide information.

Respectfully submitted,

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[3] *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994).

[4] *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

[5] While the Court of Appeals for the First Circuit rejected an employer's contention that a notice and demand for payment must be made within six years of a withdrawal, it did not have occasion to weigh in with respect to the precise conflict between the District of Columbia and Third Circuits, on the one hand, and the Seventh Circuit, on the other. *Giroux Bros. Transportation v. New England Teamsters & Trucking Industry Pension Fund*, 73 F.3d 1 (1st Cir. 1996). Rather, the timeliness question reviewed by the court of appeals was whether the trustees had issued to an employer a notice and demand for payment of withdrawal liability "as soon as practicable," a question which the court held was arbitrable. Nevertheless, the reasoning of the court suggests that, as a matter of policy, it would favor an approach that would *not* prematurely cut off the trustees' collection rights.

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

Section 1451(a)[1] of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA"), permits a plan fiduciary who is aggrieved by an "act or omission" with respect to the plan to file an action for legal or equitable relief, or both. Section 1451(f)(1) requires such an action to be brought within six years of the date on which the cause of action arose. The question presented in this request for review is whether MPPAA affords the trustees of multiemployer pension plans more than one cause of action to collect withdrawal liability and, if so, when these causes arise for purposes of applying the 6-year statute of limitations.

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[1] Further references to MPPAA will be to Title 29, U.S.C.A.

As both Congress and this Court have recognized, uniform rules for the governance of multiemployer plans are of critical importance for the sound, cost-effective administration of these plans. To the extent federal courts of appeals differ in their construction of MPPAA, however, the objective of national uniformity is frustrated. The Ninth Circuit's ruling heightens the division of opinion which now exists among the courts of appeals which have issued rulings expressly construing MPPAA's statute of limitations provision; *e.g.*, the Court of Appeals for the District of Columbia Circuit,[2] the Third Circuit,[3] the Seventh Circuit [4] and now the Ninth Circuit. As a result, three distinct approaches now exist which urgently require resolution.

In the case at bar, the Ninth Circuit ruled that MPPAA's 6-year statute of limitations begins to run as of the date of withdrawal, rather than as of the date an employer fails to make a payment demanded by the trustees.[5] The court so ruled even though a plan cannot determine—as of the date of withdrawal—whether the employer has *any liability* as a result of the withdrawal and cannot assert a legal claim to payment as of that date. As a significant amount of time is likely to elapse before a plan is able to determine with reasonable certainty that a withdrawal has occurred, calculate the resulting liability (if any), prepare a payment schedule, and issue a notice and demand for payment, the Ninth Circuit's ruling will result in trustees' having far less than six years either to

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[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989).

[3] *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994).

[4] *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

[5] The court felt bound by another panel's ruling in *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1361, 131 L.Ed.2d 217 (1995).

collect scheduled payments or to declare a default and collect the accelerated debt. Moreover, because the statute of limitations is rigidly fixed on the date of withdrawal, the trustees could risk losing all installments falling due six years after that date for any number of reasons; for example, if an employer initially makes its scheduled payments but then stops, knowing that the statute of limitations has run on the plan's claim for the balance and that it is also too late to declare a default and collect the accelerated debt.

In contrast to the Ninth Circuit, the Seventh Circuit has ruled that the limitations period begins to run from the date of the first missed payment demanded by the plan sponsor. However, the Seventh Circuit, like the Ninth Circuit, failed to give proper weight to the fact that MPPAA permits employers to make installment payments for up to 20 years and also gives the trustees total discretion whether or not to declare a default and accelerate the debt as a result of the employer's failure to make a scheduled installment payment, at least in the absence of administrative review or following an arbitrator's award. Although various provisions of MPPAA contemplate two distinct causes of action, one to collect missed installment payments and one to collect the accelerated debt (upon notice of default), the court found that pension plans can assert only *one* claim against withdrawn employers; namely, for the *full* amount of withdrawal liability. The court reasoned that even if a plan may permit an employer to amortize the debt over as long as 20 years, the entire debt is presumptively due at the outset. Thus, the trustees' cause of action arises only once—on the date the first installment payment is missed. Consequently, a fund has only six years from that date in which to file an action to collect unpaid installments or to accelerate the debt and collect the entire amount due. Although the Seventh Circuit's approach differs from the Ninth Circuit's in that the triggering date is different, both decisions suffer from the same defect because they render MPPAA's "20-year in

stallment payment cap" meaningless and eliminate the trustees' discretion whether and when to declare a default and accerelate the debt.

A third (and much sounder) approach has been taken by the Courts of Appeals for the District of Columbia and the Third Circuits, in recognition that Congress made a reasoned determination that plans would be most likely to collect a withdrawal liability debt if employers had sufficient time to pay it; and that practical and legal constraints exist with respect to the ability of trustees to declare a default and to accelerate the debt.[6] Under both courts' approach, a plan's claim accrues only when an employer fails to meet a demand for payment to which the plan is entitled. Accordingly, a cause of action would accrue each time an employer failed to make a scheduled installment payment and the trustees would also have six years from each such date to collect the amount due. Under that rationale, the trustees would also have six years from the date the accelerated payment was due (following a notice of default) to file a collection action for the accelerated debt.[7] The NCCMP specifically endorsed this approach in *Kahle Engineering, supra*, and continues to believe that the rulings of the District of

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[6] According to a Pension Benefit Guarantee Corporation ("PBGC") Regulation, 29 C.F.R. § 2644.2(c)(1), which has been consistently followed by most plans and accepted by almost all federal courts to date, plans may not declare a default and accelerate a debt pending administrative review and arbitration. This is, indeed, one basis upon which the PBGC as well as numerous plans have argued that the "pay now, dispute later" structure of MPPAA is not unconstitutional. *United Retail & Wholesale Emp's Teamsters Local 115 Pension Plan v. Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986), *aff'd by an equally divided Court*, 481 U.S. 735 (1987).

[7] Under this approach, only unpaid installments falling due more than six years prior to the filing of a complaint would be uncollectible. Moreover, the trustees—at any point in the payment schedule—could accelerate the debt and collect all future payments as well as any past installments falling due within the 6-year period prior to filing a complaint to collect the entire debt.

Columbia and Third Circuits reflect a correct reading of the statute.

Congress clearly intended that actions to collect withdrawal liability under Title IV of the statute should be subject to a uniform limitations period. The NCCMP is concerned that without this Court's review of the Ninth Circuit's opinion, further misreadings of the statute will occur, and hence, further divisions of opinion. More specifically, the NCCMP is concerned that if either the Ninth or the Seventh Circuit's approach is adopted by those courts of appeals which have not yet addressed the statute of limitations issue, or by district courts in the absence of binding appellate precedent, the statutory scheme for collecting withdrawal liability will be substantially undermined, and the effectiveness of MPPAA reduced. In addition, the trustees' ability to encourage withdrawn employers to reenter the plan under the statute's abatement rules will be substantially impeded unless they retain the statutory discretion *not* to declare a default and accelerate the debt, as acceleration could precipitate the employer into insolvency or would require the employer to pay so large an amount of "past due" withdrawal liability that there would be no incentive to re-enter the plan.

Since all of these results are inimical to the financial health of multiemployer plans, the NCCMP respectfully urges the Court to grant the Petition for *Certiorari* for reasons set forth in greater detail below.

SUMMARY OF REASONS FOR GRANTING PETITION

1. The Ninth Circuit's approach that MPPAA's 6-year statute of limitations begins to run against the trustees on the date of an employer's withdrawal is inconsistent with decisions of this Court and three courts of appeals. It is also premised on a misconstruction of the statutory harm which gives rise to an action to collect withdrawal liability payments. Although a plan is harmed in an abstract sense when an employer withdraws, because any withdrawal diminishes the plan's contribution base, withdrawal liability payments are intended to make plans whole for the

loss of future contributions. Therefore, a plan cannot be harmed by an employer's "act or omission" under MPPAA's civil enforcement provision unless the plan first determines that a *withdrawal* results in *liability* and the employer fails to pay it.

Significantly, an employer can withdraw but incur no liability as a result of MPPAA's *de minimis* rule, or because of statutory exemptions, or because of the application of controlled group principles. Moreover, this Court has ruled that a withdrawing employer owes nothing until a plan first demands a payment, while the District of Columbia, Third, and Seventh Circuits—either expressly or by inference—regard the date of withdrawal as being irrelevant with respect to the accrual of the trustees' claim for withdrawal liability. However, as the courts of appeals differ among themselves as to when trustees' claims do arise, this Court's review is necessary to provide a uniform construction to a critical statutory provision, and therefore to prevent other appellate or district courts from selecting an approach that substantially curtails the trustees' enforcement rights in derogation of Congress's intent.

2. In establishing the date of withdrawal as the date on which the trustees' cause of action to collect withdrawal liability accrues, the Ninth Circuit failed to understand the realities in which multiemployer plans operate. Sections 1383 and 1385 of MPPAA set forth the criteria for complete and partial withdrawals, while various other provisions describe events that are not treated as withdrawals as long as certain statutory requirements are met. In addition, plans may disregard transactions designed primarily to evade or avoid withdrawal liability. However, it is well established that the information necessary to ascertain whether a withdrawal has occurred is often time-consuming and difficult for plans to obtain, a problem which is compounded by the requirement that trades or businesses under common control must be treated as a single employer under highly complex and technical rules.

Moreover, even if a plan is able to secure all of the relevant information, the statutory formulae for calculating withdrawal liability and preparing a payment schedule are highly complicated and frequently require the gathering of data that is not necessarily immediately available, a problem which again is compounded by controlled group rules.

Knowing of these difficulties, Congress did not require plans to assess or collect withdrawal liability as of the date of withdrawal; rather, Section 1399(b)(1) requires plan sponsors to notify employers of their withdrawal liability and demand payment "as soon as practicable." If trustees issue a premature notice and demand without sufficient inquiry, they risk an injunction against the assessment as well as sanctions. However, if they undertake the type of careful analysis which Congress intended when it gave the trustees' determinations a presumption of correctness (a presumption upheld by this Court), they risk a significant foreshortening of their enforcement rights. That payment schedules commonly exceed five or six years is evidenced by the fact that MPPAA itself forgives only those installments due after the *first 20 years*.

Moreover, employers could manipulate the limitations period to deprive plans of most of the liability owed; for example, by complying with the payment schedule *only* until the 6-year period has expired and then stopping, or by curing any outstanding delinquencies arising within the limitations period so as to preclude acceleration of the debt before the trustees' "single" claim expires. In this respect, the Ninth Circuit's approach shares this problematic result with that of the Seventh Circuit.

In addition, by establishing a single claim for withdrawal liability, the Ninth and Seventh Circuits—in contrast to the District of Columbia and Third Circuits—have failed to appreciate existing restraints on trustees' enforcement rights as well as the discretionary nature of MPPAA's default and acceleration provision. There are numerous reasons why trustees might choose not to ac-

celerate; most importantly, to prevent bankruptcy and to encourage re-entry into the plan.

As the purpose of MPPAA is to ensure that plans collect the money due from withdrawn employers, the Ninth and Seventh Circuits' construction of Section 1451(f)(1) should be rejected in favor of the more flexible approaches of the District of Columbia and Third Circuits, which accommodate the needs of multiemployer plans while not imposing undue prejudice on withdrawn employers.

REASONS FOR GRANTING PETITION

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH RULINGS OF THIS COURT AND THREE COURTS OF APPEALS

In *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo, supra*, the Court of Appeals for the Ninth Circuit ruled that for actions to recover withdrawal liability arising from a complete withdrawal under Section 1383(b), applicable to the construction industry, the 6-year limitations period begins to run when the conditions for withdrawal under that section are met; *i.e.*, the employer's obligation to contribute to the plan has ceased *and* the employer has resumed previously covered work within a 5-year period thereafter without also resuming the obligation to contribute. The court reasoned that the mere cessation of the obligation to contribute under the above provision would not, in and of itself, permit the trustees to assess or receive any withdrawal liability payments or permit them to sue, as a withdrawal would not occur unless covered operations were, in fact, resumed. The court stressed that it would be "anomalous" for a limitations period on a cause of action to run against trustees before they had a "right to sue."

The court limited its holding to withdrawals defined in Section 1383(b). However, it expressly rejected the view previously advanced by the District of Columbia Circuit that the limitations period does not begin to run until a demand for payment goes unmet, observing that this would place the limitations period in the control of the

trustees and could permit lawsuits to be filed years after a withdrawal. Without any further analysis or discussion of text or policy, the *Ferbar* panel in the case at bar concluded that *Thibodo* was dispositive for all complete withdrawals, thereby consolidating the Ninth Circuit's position that a plan's cause of action to recover withdrawal liability accrues as of the date of withdrawal. There is no reason to believe that this holding does not apply both to complete and partial withdrawals under the statute.

Underlying the Ninth Circuit's approach is the apparent belief that the "act or omission" by which a multiemployer plan is harmed is the employer's act of withdrawal. However, although plans may be harmed in an abstract sense when any employer withdraws, as the plan's contribution base is thereby necessarily diminished, *statutory* harm giving rise to a cause of action to collect withdrawal liability payments cannot occur before the trustees have determined that an employer's *withdrawal* has actually resulted in *liability* and the employer fails to pay it. For example, an employer can withdraw but incur no liability as a result of the statute's *de minimis* rule (Section 1389). Or, an employer can withdraw but incur no liability as the result of one or more of the statutory exemptions; for example, the sale of assets exemption (Section 1384). Or, an employer can withdraw and escape liability because it is the member of a controlled group and the conditions for a partial withdrawal have not been met (Sections 1301(b)(1) and 1385). Thus, as recognized by this Court in *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, —— U.S. ——, 115 S. Ct. 981, 130 L.Ed.2d 932 (1995), "the withdrawing employer owes nothing until its plan demands payment . . . ." Conversely, as withdrawal liability payments are statutorily designed to make the plan whole for the loss of future contributions necessary to fund vested retirement benefits, the plan does not suffer statutory harm unless and until the employer fails to pay them.

For these and other reasons, the Courts of Appeals for the District of Columbia, Third, and Seventh Circuits have

expressly or by inference rejected the notion that a plan's cause of action accrues on the date of withdrawal, ruling, instead, that the limitations period begins to run from the date an employer fails to make a payment demanded by the plan. However, these courts differ among themselves, as noted above.

In *Joyce v. Clyde Sandoz Masonry, supra*, the Court of Appeals for the District of Columbia Circuit, the first appellate court to issue a ruling construing Section 1451(f)(1), concluded—after parsing the statute—that MPPAA contemplates the accrual of two distinct types of claims: a cause of action to collect unpaid installments and a cause of action to collect the accelerated debt (upon notice of default). The court therefore indicated (without expressly holding) that the 6-year limitations period should commence anew with each missed installment payment as well as with a plan's demand for the accelerated debt. The District of Columbia's rationale was subsequently endorsed by the Third Circuit in *Kahle Engineering, supra*, which expressly ruled that a plan has six years from the date a payment is due to collect it.

In contrast, the Court of Appeals for the Seventh Circuit in *Central States v. Navco, supra*, established a single rigid date for commencing the limitations period; namely, the date on which an employer fails to make its first scheduled payment. Viewing the trustees' enforcement rights under a "presumptive acceleration" theory, the court reasoned that the whole amount of withdrawal liability is due at the outset; thus a plan can have only one claim against an employer, which accrues on the date the first payment is missed. Both the Ninth and Seventh Circuits' approaches are incompatible with the structure of MPPAA, an applicable PBGC regulation, and the public policy underlying the statute—which is to reduce plan underfunding and thereby assure that workers will receive their anticipated retirement benefits at the end of their careers.

II. THE NINTH AND SEVENTH CIRCUITS' APPROACHES ARE INCOMPATIBLE WITH THE STRUCTURE OF MPPAA AS WELL AS WITH A GOVERNING PBGC REGULATION AND RAISE SIGNIFICANT PRACTICAL PROBLEMS FOR MULTIEMPLOYER PLANS

In ruling that the statute of limitations commences as of the date of withdrawal, the Ninth Circuit failed to understand the realities in which multiemployer plans operate.

A. Determination and Assessment of Withdrawal Liability

Sections 1383 and 1385 of MPPAA describe the criteria for complete and partial withdrawals. Various other provisions of MPPAA describe events which will not necessarily be deemed to be a complete or partial withdrawal: *e.g.*, a sale of assets, if certain statutory requirements are met (Section 1384); the substitution of one collective bargaining agreement for another (Section 1385(b)(2)(B)); a change in business form, if there is no interruption in contributions (Section 1398(1)); or a labor dispute (Section 1398(2)). In addition, plans may disregard transactions that are designed primarily to evade or avoid withdrawal liability (Section 1392(c)). Information necessary to ascertain the existence of a withdrawal or the existence of a *bona fide* statutory exemption is frequently very difficult and time-consuming for plans to obtain. Yet, if a notice and demand is made prematurely, as the result of an insufficient inquiry, courts may enjoin the assessment and impose sanctions against the plan; *e.g.*, attorney fees.[8]

The difficulty of determining the occurrence of a withdrawal is further compounded by the statutory definition of "employer." For all purposes of withdrawal liability,

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[8] *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund*, 597 F. Supp. 256 (D.D.C 1984) (plan enjoined from enforcing its notice); *T.I.M.E.-DC v. I.A.M. Nat'l Pension Fund*, 616 F. Supp. 400 (D.D.C. 1985) (attorney fees awarded against the plan).

Section 1301(b)(1) of ERISA treats as a "single employer" all trades or businesses under common control as prescribed in regulations applicable to Section 414(b) of the Internal Revenue Code. Although the existence of a controlled group is of critical importance in determining whether a withdrawal has occurred and, if so, whether it is a complete or partial withdrawal, this information is also very difficult for plans to secure, both because the controlled group rules are highly technical and complex and because employers are frequently unwilling or, indeed, unable to provide the information that is most relevant.

Finally, even when a plan is able to secure all of the information described above, the process of preparing a notice and demand takes a significant amount of time, as the statutory formulae for calculating withdrawal liability and preparing a payment schedule are very complicated and may also depend on information that is not immediately available from the plan's actuary or from other sources. In addition, the amount of an employer's withdrawal liability may also depend on its membership within a controlled group.

Knowing of these difficulties, which can be more or less significant in different industries, Congress did not direct trustees to notify employers of their withdrawal and make a demand for payment either immediately following the event or within some fixed time. Rather, Section 1399(b)(1) requires plan sponsors to issue a notice of liability and demand for payment "as soon as practicable after an employer's complete or partial withdrawal," while Section 1399(c)(2) requires employers to begin making the payments demanded no later than 60 days after the date of the demand, notwithstanding administrative challenges to the assessment; *i.e.*, a request for review, appeal of the trustees' determination, and arbitration.

As this Court recognized in *Schlitz*, *supra*, the interval between the date on which an employer effects statutory withdrawal and the date on which a plan sponsor issues a notice and demand for payment can be quite substantial. Under the Ninth Circuit's ruling, however, the time needed to properly investigate the facts and prepare a notice and demand that must be reasonably correct (given the statutory presumptions favoring the determinations of a plan's trustees and actuary)[9] is held against the trustees and curtails their collection rights. Even if a plan is able to act quickly, for example, within a year, trustees will have only five years in which to file a lawsuit for any delinquency that arises and will also need to declare a default within that period or forfeit their right to recover any delinquent payments that may arise on a payment schedule that exceeds five years, although payment schedules exceeding five years' duration are exceedingly common.[10]

Although the Ninth Circuit in *Thibodo* rejected the District of Columbia Circuit's approach because it was loath to allow trustees to "control" the statute of limitations, a perspective that is not only totally inconsistent with plaintiffs' rights generally but with this Court's reasoning in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), it is actually employers who can manipulate the limitations period so as to deprive plans of most of the liability owed.[11] For example, all an employer would need to do is to substantially comply with the payment schedule for

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[9] *See Concrete Pipe, supra* (MPPAA's statutory presumptions upheld as constitutional).

[10] Although trustees prepare the payment schedule, quarterly or monthly installments are determined in accordance with statutory guidelines described in Section 1399(c). Underlying the statutory design is Congress's intent that an employer's withdrawal liability payments should be roughly equivalent to its annual contribution obligation prior to withdrawal. Hence, an employer's entire withdrawal liability is generally amortized in level payments over a period of many years. That installment payments are likely to extend well beyond the 6-year limitations period is evidenced by Section 1399(c)(1)(B), which limits an employer's liability to the *first 20 years*.

[11] Moreover, the trustees' "control" would not be greater than that of any installment creditor, for example, a mortgage lender.

a period of time which, when combined with the interval between the date of the withdrawal and the date the first payment was due, equals six years. After that time, the employer could stop making installment payments with impunity; as the 6-year limitations period would have run on the trustees' single claim, they could neither collect future installments nor accelerate and collect the remaining debt. A similar result could be achieved by "curing" intermittent delinquencies so as to preclude acceleration during the 6-year limitations period. Although to a somewhat lesser extent, the Seventh Circuit's *Navco* decision could lead to a similar foreshortening of the trustees' statutory enforcement rights.

B. Default and Acceleration

In establishing a single inflexible date for determining the accrual of a plan's cause of action to collect withdrawal liability, the Ninth and Seventh Circuits—in contrast to the District of Columbia and Third Circuits—have failed to appreciate existing restraints on trustees' enforcement rights as well as the discretionary nature of MPPAA's default and acceleration provision.

As noted earlier, under Section 1399(c)(2), withdrawal liability is payable in accordance with the trustees' schedule, beginning no later than 60 days after the date of demand, whether or not the *employer* requests a review of the trustees' determination or initiates arbitration. With regard to the *trustees'* enforcement rights, however, a critical distinction exists, depending on whether or not the employer has sought review and initiated arbitration.

If the employer fails to request a review or fails to initiate arbitration, it waives the right to contest the assessment, and the amounts demanded by the trustees are due and owing as set forth in the trustees' payment schedule. Consequently, if these payments are not made, the trustees may file suit to collect the delinquent installments in accordance with Section 1401(b)(1). In addition, the trustees may declare the employer in default and accelerate the debt under Section 1399(c)(5).

For purposes of Section 1399(c)(5), the term "default" means the failure to make a payment when due if that failure is not cured within 60 days of the date on which the employer received written notification of the failure. Significantly, MPPAA's "default" provision is not self-executing. Rather, to put an employer in default, the trustees must first notify the employer of its failure to have made a required payment and then permit the employer 60 days in which to effect a cure. Moreover, Section 1399(c)(5) does not *require* the trustees to accelerate the debt on default; this is entirely a matter of trustee *discretion* and, as will be discussed below, it may well be in the best interest of the plan not to declare a default.

In contrast to the above, if the employer has requested a review and initiated arbitration, the trustees—under an operative PBGC regulation—have *no discretion* whether or not to declare a withdrawn employer in default and accelerate the debt during the period the employer has for contesting the withdrawal liability assessment. Rather, 29 C.F.R. § 2644.2(c)(1) provides that a default cannot occur earlier than 61 days after the employer's time to contest the withdrawal liability assessment has expired. If an employer misses any payment prior to the occurrence of the last possible event; i.e., the arbitrator's decision, the trustees may assess interest on that payment, and seek to collect the missing payment by filing a collection action. However, the debt cannot be accelerated and the trustees cannot bring an action to collect the entire amount due.

Moreover, even when the trustees' payment schedule becomes final, the trustees have complete discretion not to accelerate the debt but to pursue only the installments set forth in that schedule. Significantly, Section 1399(c)(5) states only that "in the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability . . . ." (Emphasis added.) The discretionary nature of MPPAA's default provision is further confined by PBGC regulation 29 C.F.R. § 2644.2(b)(2), which states that, upon

default, the trustees are free to accelerate (if they so desire) only a portion of the withdrawal liability.

Under the Ninth and Seventh Circuit's rulings, however, the trustees would have no discretion whether or not to declare a default and accelerate the debt; this would have to be done within the fixed 6-year period because (unlike the District of Columbia and Third Circuits, whose approach permits trustees to pursue separate and distinct claims for installment payments and the accelerated debt) neither the Ninth nor the Seventh Circuit recognizes more than a single claim for withdrawal liability. However, this loss of discretion raises significant problems for multiemployer plans.

Of particular concern to the NCCMP is the implication that trustees have a fiduciary duty to accelerate an employer's withdrawal liability debt either as soon as the first payment is missed (under the Seventh Circuit's theory of presumptive acceleration) or no later than six years of the date of withdrawal (Ninth Circuit).

On the one hand, such a fiduciary duty could place the trustees in the anomalous position of being required to accelerate the debt without having the ability to enforce a demand for full payment in the event the employer has requested review and initiated arbitration. On the other hand, even if the trustees are given six years from the date of the first missed payment to accelerate the debt and initiate a lawsuit, a fiduciary duty to accelerate would eliminate the trustees' discretion not to declare a default and accelerate the debt if, at that point in time, the trustees determined that acceleration would not be in the best interest of the fund and its participants and beneficiaries.

A number of reasons exist why trustees might determine that it would *not* be in the fund's best interests to accelerate withdrawal liability and sue for the full amount, at least before such time as the prospect of receiving installment payments becomes substantially unlikely. First, an employer having financial difficulties may attempt to comply with the trustees' payment schedule, but may make its

installment payments late and also at sporadic intervals. In such circumstances, acceleration of the debt and a demand for full payment would likely prompt the employer to seek protection under the Bankruptcy Code. The trustees might therefore determine that it would be more prudent to pursue the monthly installments rather than the accelerated amount, in the expectation of achieving a larger total recovery. Although the employer's financial situation and payment practices might ultimately prompt the trustees to determine that it would be best to accelerate the debt, the desirability of exercising this option might not become apparent within six years of the date of withdrawal or the first missed installment. Under *Ferbar* and *Navco*, however, the trustees would have to accelerate the debt and sue for the full amount of withdrawal liability within those periods or forever lose the right to recover.

Additionally, Section 1399(c)(5)(B) allows plans to adopt rules permitting the trustees to accelerate a withdrawal liability debt where events other than nonpayment indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability. Events such as the employer's insolvency, dissolution, and the commencement of voluntary or involuntary bankruptcy proceedings could trigger a default under this section; however, these events, too, might not occur within six years of the date of withdrawal or of a missed installment payment. Again, under *Ferbar* and *Navco*, trustees could lose their right to accelerate and collect the balance of the withdrawal liability debt if the 6-year limitations period is rigidly linked to the date of withdrawal or the date a first installment payment is missed.

Further, a rigid, single 6-year limitations period could deprive trustees of flexibility in dealing with withdrawn employers who may be considering re-entering the plan for a variety of reasons, including the fact that their liability under MPPAA's re-entry and abatement rules may

be less than the total withdrawal liability assessment. Acceleration of the withdrawal liability debt and the filing of a collection action could chill the employer's business efforts as well as negotiations between the bargaining parties. More importantly, acceleration could remove an important incentive for re-entry as the employer could be required to pay the entire accelerated debt, rather than a lower amount of unpaid installments, as a condition precedent for reacceptance into the plan.

Finally, as noted earlier, an employer could manipulate an inflexible limitations period by curing intermittent delinquencies or by making payments on schedule until the limitations period expires, and then stop, leaving a plan without the ability to collect the balance of the debt.

In sum, there is no basis for the notion that trustees have a statutory and fiduciary obligation to accelerate and collect withdrawal liability within six years either of the date of withdrawal or of the date of a first missed payment, and acceleration of the debt in accordance with such a rule could well result in a loss to the fund. As the District of Columbia Circuit noted in *Joyce*, *supra*, a foreshortening of the trustees' rights would be inimical to the policies animating MPPAA. For, although "Congress has indicated that promptly collecting outstanding sums is desirable," this "is one aspect of the Act's more general purpose of ensuring that plans *collect the amounts due from employers*, a purpose subsidiary to the Act's overriding purpose of ensuring that plans remain solvent despite employer withdrawals (and thus able to provide pension payments to workers who have earned them)." 871 F.2d at 1126 (emphasis added).

Consistent with the purposes of ERISA as well as the specific structure of MPPAA, the Ninth and Seventh Circuits' construction of Section 1451(f)(1) should be rejected in favor of the sounder and more flexible construction offered by the District of Columbia and Third Circuits to assure that the federal courts do not impermissibly

intrude upon the trustees' discretion and erroneously prejudice a plan's collection rights. As the Third and District of Columbia Circuits as well as Petitioner have indicated, sufficient incentives exist to encourage plans to act with reasonable diligence. Moreover, employers who feel prejudiced by delay can raise their timeliness objections in arbitration and can arguably also assert a laches defense in federal court. The NCCMP therefore strongly supports Petitioner's request for review so that MPPAA's statute of limitations provision can be fully considered and clarified to permit trustees a meaningful remedy under the statute.

CONCLUSION

The fundamental purpose of MPPAA was to establish a mechanism by which employers who withdraw from multiemployer plans continue to pay their fair share of the plans' liability for unfunded vested benefits. However, although employers have the option of paying an assessment in a lump sum, Congress contemplated the amortization of withdrawal liability debts over a long period of time, though not to exceed 20 years. By misconstruing MPPAA's statute of limitations provision, the Ninth Circuit impermissibly curtailed the trustees' collection rights so that the "20-year payment cap" is effectively reduced to less than six years. The Seventh Circuit likewise foreshortened the trustees' ability to recover withdrawal liability payments. In contrast, the District of Columbia and Third Circuits have offered a reasonable approach that is fairest to plans without prejudicing employers. As Congress intended that MPPAA's civil enforcement provision be governed by a uniform statute of limitations, and the federal courts are in disagreement as to how the 6-year limitations period should be applied, review is clearly necessary to clarify the statute and to prevent yet further misconstruction. For all of the reasons stated above, the NCCMP respectfully urges the

Court to grant the Petition and to review and reverse the decision below.

Respectfully submitted,

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